Supreme Court, U.S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1601

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

vs.

ROBERT MATA,
Respondent.

REPLY BRIEF FOR PETITIONER

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SUBJECT INDEX

Page

ARGUMENT

I

PROCEDURAL ARGUMENTS HAVE BEEN PRESERVED FOR THIS COURT'S REVIEW AND EITHER PROCEDURAL DEFAULT BARS FEDERAL REVIEW OR THE STATE COURT FACTFINDINGS MUST BE PRESUMED CORRECT 1

A. Procedural Default 1

1. Failure To Object To Identification Testimony, The Effect Of Direct State Appellate Review, And The Appropriate Federal Standards Of Review Were Argued Below And Are Preserved For Review 1

2. State Law Provides An Adequate And Independent Ground Barring Federal Review 8

B. The Ninth Circuit Disregarded The State's Factual Findings And Made De Novo Findings Which Are Unsupported By The Record 9

SUBJECT INDEX

Page

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING DEFENDANT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY THE USE OF PRETRIAL IDENTIFICATION PROCEDURES 12

CONCLUSION 29

TABLE OF AUTHORITIES CITED

CASES

Federal:

Page

Albrecht v. Nelson, 462 F.2d 623 (9th Cir. 1972) 5

Alesi v. Craven, 446 F.2d 742 (9th Cir. 1971) 5

Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969) 2, 3, 6, 7

Duignan v. United States, 247 U.S. 195 (1927) 2

Fay v. Noia, 372 U.S. 391 (1963) . . . 1

Foster v. California, 394 U.S. 440 (1969) 13

Jackson v. Virginia, 443 U.S. 307 (1979) 16

Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed.2d 86 (1980) 7

Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979) 19, 26

Neil v. Biggers, 409 U.S. 188 (1972) . 16

Stovall v. Denno, 388 U.S. 293 (1967) 12, 18

Townsend v. Sain, 372 U.S. 293 (1963) . 11

Ulster County Court v. Allen, 442 U.S. 140 (1979) 8

TABLE OF AUTHORITIES CITED

CASES

Page

United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976), rehearing denied, 530 F.2d 976, cert. denied, 429 U.S. 841 17

United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) 15

Wainwright v. Sykes, 433 U.S. 72 (1977) 1, 3, 7

State:

People v. Guzman, 47 Cal.App.3d 380, 121 Cal.Rptr. 69 (1975) 15

RULES

Federal Rules of Civil Procedure:
Rule 52(a) 5
Rule 81(a)(2) 5

STATUTES

28 U.S.C.:
section 2254(d) 3, 6, 4

OTHER AUTHORITIES

Developments in the Law - Federal Habeas Cropus, 83 Harv.L.Rev. 1038 (1970) 1

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ARGUMENT

I

PROCEDURAL ARGUMENTS HAVE BEEN PRESERVED FOR THIS COURT'S REVIEW AND EITHER PROCEDURAL DEFAULT BARS FEDERAL REVIEW OR THE STATE COURT FACTFINDINGS MUST BE PRESUMED CORRECT.

A. Procedural Default.

1. Failure To Object To Identification Testimony, The Effect Of Direct State Appellate Review, And The Appropriate Federal Standards Of Review Were Argued Below And Are Preserved For Review.

Defendant's "confusion" with our procedural argument is largely a function of the failure to grasp the distinction between two conceptually different doctrines: exhaustion of state remedies as a prerequisite to federal review, and procedural default as an independent state ground barring federal review. See Wainwright v. Sykes, 433 U.S. 72, 78 (1977); Fay v. Noia, 372 U.S. 391, 399 (1963); Developments in the law - Federal Habeas Corpus, 83 Harv.L. Rev. 1038 (1970). He has consistently attributed our argument to the former

doctrine, when in fact we rely on the latter. We have stated that defendant has exhausted state remedies, i.e., no state relief is available. However, this exhaustion does not cure his failure to object to identification evidence at trial which provides an independent state ground barring federal review.

Moreover, the procedural default argument was "pressed or passed upon below." Duignan v. United States, 274 U.S. 195, 200 (1927). At the April 6, 1978, hearing on the Return, we stated defendant's failure to object to identification evidence resulted in procedural default. We informed the district court that California's appellate court addressed the merits of this claim on direct review, and under the controlling case of Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969), the state thereby forfeited the right to claim procedural default. The district court ruled that

Wainwright v. Sykes, 433 U.S. 72 (1977), was inapplicable because of California's direct review. (Petition for Writ of Certiorari, D-2, D-3.)

In our view, Curry review necessitates that state court findings be presumed correct. Our argument that the state court's findings satisfied section 2254(d), went unchallenged and undisputed by defendant throughout proceedings below.

To the district court we argued:

> "Petitioner complains that the eyewitness identification of him by two of the three eyewitnesses to the murder, inmates Jay Allen and Rigoberto Almengor, was admitted in violation of his right to due process of law. This identical issue was raised on appeal from petitioner's conviction. The Court of Appeal, a court of competent jurisdiction,

determined in a written opinion in a full and fair hearing that the pretrial identification procedure was not impermissibly suggestive. Accordingly, this determination is presumed correct. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief herein unless, upon a review of the pertinent record as a whole, this Court finds that the state court determination that the identification evidence was properly admitted, was clearly erroneous. 28 U.S.C. § 2254(d). Petitioner bears the burden of establishing by convincing evidence, that the state court determination was clearly erroneous. 28 U.S.C. § 2254(d)."

(J.A., pp. 194-195.)

We asked the Court of Appeals to uphold

the district court's factual findings unless clearly erroneous:

> "It is axiomatic that the District Court's factual finding in this habeas corpus proceeding should not be set aside unless it is clearly erroneous. Rule 52(a), 81(a)(2) of Fed. Rules of Civ. Proc; Albrecht v. Nelson, 462 F.2d 623, 624 (9th Cir. 1972); Alesi v. Craven, 446 F.2d 742 (9th Cir. 1971)." (Appellee's Brief, Filed November 13, 1978, p.10.)

This building block of appellate review necessarily rests on the assertion that the state court's findings must be presumed correct and, of course, we designated the record to the Court of Appeal to include our Return. (See Record on Appeal, Northern District of California, p.103, District Court Docket.) In our

petition for rehearing, we complained that the majority opinion did not follow this reviewing standard and instead made de novo factual findings. (See Petition for Rehearing and Suggestion for Rehearing En Banc, pp.12-15.)

We attack Curry not simply because it is our first real opportunity to do so but because of the Ninth Circuit's refusal to accord state factfindings presumptive validity. While the Ninth Circuit exacted the price of federal review for the state court's alleged failure to insist upon its procedural rule, the federal court declined to pay the price imposed by Congress for federal review: deference to state factual findings. Application of section 2254(d) is the sine qua non of Curry review: a state appellate court opinion can only serve to forgive a procedural default if it is given the statutory presumption of correctness. Accordingly, we argue alternatively

to this Court that either Curry is wrong and a state court does not forgive a procedural default by rejecting a claim on the merits, or the state court findings are presumptively correct.

Contrary to defendant's contention, Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed.2d 86, 92 n.1 (1980), does not control. Not only was procedural default raised and ruled upon below, but the issue here is not simply whether application of Wainwright v. Sykes bars federal review, but rather whether a state appellate decision acts as a waiver of the default thereby circumventing application of Sykes.

Indeed, if this Court determines that the State did not forfeit its right to claim procedural default, the litigants and the courts have already addressed the Sykes claim as to this issue, since "cause" and "prejudice" rests on the resolution of the merits of this claim and of defendant's

second contention below, that counsel was incompetent for failing to object to this identification evidence.[1/]

2. State Law Provides An Adequate And Independent Ground Barring Federal Review.

Defendant notes the existence of well-carved exceptions to the contemporaneous objection rule. Identification evidence is not among them. To the contrary, none of those exceptions apply here and settled state law upholds application of this rule to identification testimony. Compare, Ulster County Court v. Allen, 442 U.S. 140,

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1. Defendant argues here that counsel's failure to object to identification testimony was not tactically based, since "the only detail with which Almengor and Allen contradicted Childress is that Childress failed to place them at the scene. But there are a variety of other ways they [Allen and Almengor] could have been placed at the scene . . . ." (Brief for the Respondent, p.17 n.2.) Defendant now inverts the use he made of this inconsistency at trial where he argued that Allen and Almengor were at the scene but Childress, whose identification could not be impeached with pretrial procedures, was not. (See RT 1332-1338.)

150-151 (1979). Moreover, the rule only prohibits reversal following the failure to timely object, it does not stop a court from explaining to a defendant why a claim has no merit.

B. The Ninth Circuit Disregarded the State's Factual Findings and Made De Novo Findings Which Are Unsupported By the Record.

Defendant concedes that primary historical facts in this case are entitled to a presumption of correctness, but states that conclusions of federal law to be drawn from those facts is a matter of independent judgment by federal courts. Defendant asserts the Ninth Circuit was "faithful" to this principle, drawing its facts from the record, and not contradicting state court factual findings. (Brief for the Respondent, pp.18-20.)

The Ninth Circuit was as faithful to the record and the state court's factual findings as Henry VIII was to his wives. The only two

factors reviewed, probative of independent recollection, are laden with betrayal:

(1) Opportunity To View. The state court opinion notes that three inmate witnesses (Childress, Allen and Almengor) testified that they saw the stabbing take place and resolved that they had an opportunity to view the crime. (Petition for Certiorari, C-3, C-5.) The Ninth Circuit dismissed this finding with their own: " . . . the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witness' attention." (Petition for Certiorari, A-9.) The record does not contain one shred of evidence supporting this primary factual finding which is in complete contradiction with the state court's finding.

(2) Accuracy Of The Description. The state court found the descriptions by the witnesses were accurate (Petition for Certiorari, A-9), and by way of contradiction, the Ninth Circuit found they were not "detailed", by overlooking the detail contained in the record. (See Petition for Certiorari, pp.31-32.)

Similarly, the record supports the state court findings bearing on the issue of suggestibility, i.e., that there was no showing of influence by the investigating officers and that the photographic procedures were inherently fair.

We submit that the historical facts are either explicit or readily inferrable from the state's findings, but if we are wrong, then under Townsend v. Sain, 372 U.S. 293, 313 (1963), the Ninth Circuit was obligated to grant an evidentiary hearing, rather than substitute itself as the trier of fact.

II.

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING DEFENDANT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY THE USE OF PRETRIAL IDENTIFICATION PROCEDURES.

Our opening brief traced the development of this Court's cases regarding the due process implications of the admission of eyewitness identification evidence from the seminal case of Stovall v. Denno, 388 U.S. 293 (1967). There, in slightly less than a page of text, the Court defined a new due process concept and applied it to the case before it. Id. at 301-302. In subsequent cases the Court discussed at greater length the constitutional standard and its doctrinal basis. As the briefs demonstrate, the lower courts have not agreed on a uniform approach to the resolution of Stovall claims. In this argument we will state what we believe is the proper approach for a court faced with a claim that introduction of identification evidence would violate a defendant's

due process rights. We will then apply that standard to the facts of this case.

Once objection is made to introduction of evidence of a pretrial identification and/or an in-court identification on the ground that its admission would violate a defendant's due process rights, a court must initially determine whether the pretrial identification procedures were so impermissibly suggestive that they could give rise to a very substantial likelihood of mistaken identification. The focus of this inquiry is on the particular pretrial identification confrontation and the circumstances surrounding it. The pertenent question is whether, in the words of the Court in Foster v. California, 394 U.S. 440, 443 (1969), the identification procedures had the effect of telling the witness, "This is the man" so that it was all but inevitable that he would identify a particular suspect whether or not he was in fact "the man."

Therefore, in a case where a witness has been asked if he can select the photograph of a criminal from a group of photographs, the court may look not only to the photographs themselves but also to any conduct by law enforcement officers which would tend to make one or more of the photos stand out from the group. Similarly, the court may look to the circumstances of the crime to the extent that they have a bearing on the issue of suggestiveness. For example, if a photo spread contains nine photos of men wearing white shirts and one photo of a man wearing a distinctive red shirt, and the witness described the criminal by reference to such a distinctive red shirt, this circumstance would obviously be relevant to a determination of whether the photo spread suggested to the witness that the man in red shirt was the criminal. If, however, the witness described the criminal as wearing a blue shirt, this circumstance would have no

bearing on the issue of suggestiveness.

Should the court determine that the pretrial identification procedures were not impermissibly suggestive, the identification evidence may be presented to the trier of fact. The defendant retains the ability to persuade the trier of fact that it should be given little or no weight. He may cross-examine the prosecution witnesses. He may introduce evidence to contradict the prosecution evidence. He may argue that the evidence is worthless. Finally, he may be able to have the court specifically instruct the jury on the factors that affect eyewitness identification testimony, as they relate to reasonable doubt. See e.g., United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); People v. Guzman, 47 Cal.App.3d 380, 121 Cal.Rptr. 69 (1975). Admission of this evidence, and reliance on it by the trier of fact to support a conviction, does not violate the constitution

unless the evidence, considered together with the other evidence in the case, would not permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

If, and only if, the court determines that the pretrial identification procedures were so impermissibly suggestive that they could give rise to a very substantial likelihood of mistaken identification does it become necessary to determine whether, on the facts of the particular case, they did in fact have this effect. The focus of this inquiry is on the reliability of the evidence. In making this latter determination the court examines the five factors articulated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972) and Manson v. Brathwaite, 432 U.S. 98, 114 (1977) and any other circumstances bearing on the issue of reliability. The "corrupting effect" of the impermissibly suggestive

identification procedures on the reliability of the identification evidence is also considered at this juncture. Manson v. Brathwaite, supra at 114. If the identification evidence is so unreliable that there is a very substantial likelihood that it is mistaken it must be excluded. If not, it is treated just as any other evidence and its strength is subject to the jury's evaluation.

We believe that this approach is consistent with that expressed in the cases relied on in our opening brief. Though the cases sometimes express the proper "two-part approach" in an abbreviated manner, see e.g., United States v. Gidley, 527 F.2d 1345, 1350 (5th Cir. 1976), rehearing denied, 530 F.2d 976, cert. denied, 429 U.S. 841, it is clear that they focus first on the suggestive nature of the identification procedure. If it was impermissibly suggestive, the question then becomes whether the identification evidence is nonetheless

reliable.

Our discussion to this point has not mentioned the concept of "necessity" for the use of a particular identification procedure, since it has no bearing on the degree of suggestiveness present in a particular identification procedure or on the reliability of any identification evidence. Defendant's argument to the contrary appears to be based on confusion between the concepts of whether an identification procedure was "reliable" (in the sense that it would not be likely to produce a mistaken identification) and whether identification evidence was "reliable" (in the sense that it was not so untrustworthy that its admission would violate the defendant's due process right to a fair trial). Its result is to engraft onto a fact-oriented balancing process a form of the "per se" approach rejected in Manson. It also departs from the doctrinal moorings of Stovall and its progeny -- a concern with

the problems of eyewitness identification and a desire that unreliable eyewitness testimony not be admitted, Manson v. Brathwaite, supra at 111-112 -- into an uncharted sea of problems.

For example, defendant apparently cannot decide whether lack of "necessity" for use of photo identification procedures weighs against the admission of identification evidence in every case or only in cases where the record contains some evidence from which a court might "find" that in the particular case a lineup identification would have been more "reliable." (RB, pp.28-31.) The Ninth Circuit clearly opted for the former interpertation, finding a lack of "necessity" from the fact that defendant was a state prison inmate and was therefore available for a lineup. Mata v. Sumner, 611 F.2d 754, 757 (9th Cir. 1979). Defendant's argument that the record supports a "finding" that in this case a physical lineup was

required is flawed in several respects. For example, he argues that Almengor and Allen "complained of the age of the photos." (RB, p.28.) The citations supporting this statement refer to their comments after viewing the first set of photos on October 27, 1972. Thereafter, a second set of photos was shown to them. They apparently did not complain about them. Similarly, the statements allegedly supporting defendant's contention that Almengor testified that he "needed a physical line-up in order to make a positive identification" (RB, pp.29-30) were made before he viewed the pictures on October 30. His argument that the witness' recantation of their identification of Vargas from the photos showed the need for a lineup (RB, pp. 30-31) demonstrates instead that they were not forced into identifing the particular defendants and would instead be willing to admit making an incorrect identification.

Neither defendant nor the Ninth Circuit

define the concept of "necessity" with any precision. Assume a case where the defendant is in custody but the police do not have access to the services of a sufficient number of persons of similar appearance to construct what they believe to be a fair lineup. What efforts must they make to find similar persons? Are the reasonableness of their belief and the extent of their efforts to be examined in an evidentiary hearing? If, as defendant contends, "necessity" or its lack relates to the reliablity of evidence, must the jury be informed of, and make determinations regarding, these matters? Are due process protections dependent upon accidents such as whether an Eskimo suspected of committing a crime was arrested in Anchorage, where a lineup consisting solely of Eskimos could presumably be arranged without much difficulty, or in Miami Beach? Would the concept of "necessity" require the prosecution to justify why a five man

lineup was used instead of a six man lineup? Questions such as these demonstrate not only that recognition of a concept of "necessity" would pose additional practical problems for courts and juries, but also that "necessity" simply has nothing to do with either the suggestiveness of a particular pretrial identification procedure or the reliability of particular identification evidence.

We believe that application of the appropriate constitutional standard compels a conclusion that, though the identification proceedings in this case may have fallen short of the ideal in some respects, they were not impermissibly suggestive.

It should be noted initially that the witnesses were shown a large number of different photographs before they selected the defendants. Almengor saw an unspecified number of loose mug shots, as well as several hundred other pictures of inmates on October 19. (RT 398, 400, 422.) On October 27, he

and Allen were shown a group of 24 photographs (People's Exhibit 23) containing photographs of the defendants. (J.A., pp.96-98, 104.) On October 30, they were shown a substantially different group of 15 photographs containing different photographs of the defendants (People's Exhibit 24). (J.A., pp.100-103, 105-107.)

Defendant contends that this procedure was impermissibly suggestive in five particulars. (RB, pp.37-43.)

First, he claims that the identification procedure was "suggestive" because the witnesses believed that the photographs were inadequate to permit "reliable" identification and that a lineup would be required. (RB, p.37.) As was noted earlier, the witnesses believed only that People's Exhibit 23 was unsatisfactory because some of the pictures in it were outdated. They voiced no such complaint with respect to People's Exhibit 24. In any event, if defendant's claim

regarding this matter were accurate, it would seem to point away from a finding of impermissible suggestiveness. If the witnesses believed the photographs did not fairly represent any of the persons involved in the crime and that they could not make an identification from them, selection of the defendants' photographs would hardly have been "suggested."

Second, he contends that the prison officials told Almengor that his earlier "positive" identification of "Bogus Pete" Nunez was incorrect. (RB, p.38.) The very page of the transcript cited in support of this statement shows that Almengor's identification of "Bogus Pete" was anything but positive. (RT 711, see also RT 398.) It is true that, to the extent that "Bogus Pete" was removed from consideration in subsequent identification proceedings, those identification procedures may be considered "suggestive" in that they focused the witness'

attention away from "Bogus Pete" and onto the other persons depicted. However, the photographs of defendant and his codefendants still were not made to stand out from those of the other inmates. The range of choice remained large.

He also contends that the identification procedures were impermissibly suggestive because the photos of inmates Ramirez and Reymundo, whom Almengor had tentatively identified as being similar in appearance to the persons who attacked the victim, were removed. Again, removal of one or two photos from consideration would not have the effect of "singling out" the photographs of defendant and his codefendants from the remaining group of photographs.

Similarly, inclusion of photographs of the three defendants in both People's Exhibit 23 and People's Exhibit 24 would not suggest to the witnesses that they were supposed to select these photographs. As

is apparent from review of the exhibits, the photographs of each of the defendants are markedly different.[2/]

Finally, defendant's contention that the witnesses saw him and his codefendants being taken out of segregation in order to be re-photographed, and that this fact suggested to them that the prison officials believed them to be guilty, is contradicted by the witnesses' testimony that they did not know who was being taken out to be photographed again. (RT 444-445, 634, 645-646.)

Even if the photo identification procedures were impermissibly suggestive, they still did not "corrupt" the identifications to the extent that they should have been

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2. Judge Sneed, in his dissenting opinion in the Ninth Circuit, stated:

> "So different is the appellant's photograph used in the October 27 spread from that of October 30 that it is difficult to accept the fact the appellant appeared in the October 27 spread at all." (611 F.2d at 761.)

excluded from evidence on the ground that there was a very substantial likelihood that they were mistaken. The witnesses viewed defendant at close range, under good lighting conditions, for an amount of time sufficient to enable them to identify him. Almengor faced defendant directly on at least two occasions during the incident while neither of them were struggling. (J.A., pp.43-46.) Allen had seen defendant on numerous occasions before the incident, having previously lived in the same dorm with him. (J.A., p.79.) The witnesses' attention was fixed on defendant and his companions because they knew what was occurring almost immediately after the attack began. Their descriptions of defendant were reasonably detailed and apparently fairly accurate. Their identifications of him, both from People's Exhibit 24 and at trial, were positive. The time between the crime and the photo identification was not so substantial that it would

be likely to dim their memories appreciably.

As might be expected in a case of this nature, the three defendants, through their separate counsel, presented a spirited defense. Much of their effort was aimed at discrediting the identification evidence of the inmate witnesses. In the course of his brief in this Court, defendant has again attempted to discredit them. In doing so he has indiscriminately blended attacks on their character and credibility generally and attacks on the reliability of their identification testimony. Many of his statements can be explained because of the witnesses understandable (though not laudable) desire not to be "involved" in the case. Others perhaps cannot. The fact remains that strong indicia of the reliability of the identification evidence was presented. It was not corrupted to any significient degree by any suggestive influences inherent in the pretrial

identification procedures.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

DATED: November 25, 1980.

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